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Supreme Court of the United States

OCTOBER TERM, 1963

NO. 906

[redacted] LACLEDE STEEL COMPANY, KRIM-KO CORPORATION, SCHALLER STEEL WORKS, INC., B & H, INC., STEWART-DURAVAN COMPANY, CLOAR GLASS COMPANY, INC., CLAUDE A. STAATS & SON, INC.,
Petitioners,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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Supreme Court of the United States

OCTOBER TERM, 1963

NO.

MICHOUD INDUSTRIAL FACILITIES and LACLEDE STEEL COMPANY, KRIM-KO CORPORATION, SCHALLER STEEL WORKS, INC., B & H, INC., STEWART-DURAVAN COMPANY, CLOAR GLASS COMPANY, INC., CLAUDE A. STAATS & SON, INC.,
Petitioners,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Laclede Steel Company, Krim-Ko Corporation, Schaller Steel Works, Inc., Stewart-Duravan Company, Cloar Glass Company, Inc., and Claude A. Staats & Son, Inc. (hereinafter referred to as "Lessees") pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this cause on August 22, 1963 and the order of that Court, dated December 13, 1963, denying Lessees' petition for rehearing.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported in 322 F. 2d 698. A copy

of said opinion is appended to this petition as Appendix A (*infra* page A54).

JURISDICTION

The opinion of the Court of Appeals was entered on August 22, 1963. On August 30, 1963 an order was signed granting petitioners an extension of thirty days or until September 12, 1963, within which to file an application for rehearing. On September 26, 1963 an order was signed granting petitioners a second thirty day extension or until October 12, 1963, within which to file an application for rehearing. A third order granting petitioners an extension of time until November 14, 1963, within which to apply for rehearing was signed on November 5, 1963. Petitioners filed a petition for rehearing En Banc or in the alternative for a rehearing before the original panel of judges on November 14, 1963 and said petition for rehearing was denied on December 13, 1963.

The jurisdiction of this Court is invoked under the provisions of Section 1254(1) of Title 28, United States Code (28 U.S.C. 1254(1)).

QUESTIONS PRESENTED FOR REVIEW

1. May the findings on just compensation of a commission appointed by a district court under Rule 71 A(h) to determine such issue in a condemnation suit which are adopted by the district court as the basis of its judgment, be disregarded by an appellate court where:

   a. Such findings are abundantly supported by competent evidence;

   b. The action of the appellate court amounts to a mere substitution of its judgment as to value for the judgment of the experts whose testimony furnished the basis for the findings by the commission and the district court, and

c. The written instructions of the district court and the report and findings of the commission comply with the standards set forth by this court in *United States v. Merz* and *2,872.88 Acres of Land, etc. et al. v. United States* (Feb. 24, 1964, 32 U. S. Law Week, 4165) and no determination or even claim to the contrary is made.

2. May an appellate court make a factual assumption that the existence of unleased portions of condemned property at fixed rentals necessarily establishes as a matter of law that such rentals represent the market value of the interests of Lessees whose space is condemned where:

(a) The evidence shows that the scheduled rentals did not represent fair market value at the time they were promulgated or at the time of the condemnation.

(b) The remaining space was unleased at the time of the taking because prior action of the government resulted in its removal from the market.

(c) The unleased space was inferior to that of Lessees whose space was recognized as having "peculiar and especially valuable characteristics" not susceptible to duplication.

3. May an appellate court remand an entire condemnation proceeding to the district court where there is sufficient evidence already in the record to affirm the awards as to those defendants which the appellate court has recognized as being "entitled to the benefits of their bargain".

STATUTES INVOLVED

The review sought herein will involve Rules 71A(h), 52(a) and 53(e)(2) of the Federal Rules of Civil Procedure, the text of which is set out in Appendix B (*infra* page A55-59).

STATEMENT OF THE CASE

The petition for writ of certiorari filed herein by the Board of Commissioners of the Port of New Orleans (hereinafter referred to as the Dock Board) contains a concise statement of the case and treats in great detail the background and history of this lawsuit and the property involved. Petitioners, Lessees, fully concur with the statement of the Dock Board and the reasons advanced by it why this Honorable Court should grant a writ of certiorari. However, because the Lessees' interest is dissimilar to that of the Dock Board in many respects, a separate petition for certiorari on behalf of the Lessees is deemed necessary.

It will suffice at this point to state that this condemnation suit involves a rather unusual tract of land within the limits of the City of New Orleans, Louisiana, consisting of 1,000.22 acres of land and 22 buildings, commonly referred to as the Michoud Industrial Facilities. (R. 292).

The property involved is situated approximately 13 miles east of downtown New Orleans and abuts U. S. Highway 90, a transcontinental highway. The property is bounded on the south by the Intracoastal Canal and on the east by the Michoud Canal. Rail connections are furnished by the main line of the Louisville & Nashville Railroad. (R. 291-92).

This property was originally acquired by the United States Government after the outbreak of World War II on behalf of the Defense Plant Corporation for construction of a shipyard. Construction was completed in 1944, but during the interim period the purpose of the plant was changed from shipbuilding to the fabrication of aircraft. However, this huge industrial complex was never utilized in that no aircraft were built and at the end of the war the property was declared surplus. In November

of 1947 it was sold together with all machinery, equipment, tools, furniture and fixtures located thereon to the Dock Board. (R. 292-94).

The most important facility located on the property was the large main manufacturing building which measured more than a quarter of a mile in length with ceiling heights from 48 to 55 feet. (R. 307). Other important buildings were a two-story administration building, 837 feet long and a two-story engineering building, 1,157 feet long, and a hammer building, 283 feet long (R. 304, 305, 316).

Between 1949 and the end of 1950, the Dock Board was successful in leasing approximately 400,000 square feet of building space to approximately 30 tenants.[1] (See Chart No. 1, R. 598).

During the latter part of 1950 and early January of 1951, the Dock Board was in contact with several prospective lessees and anticipated leasing the remaining unoccupied space. (R. 780 and 781). However, on January 10, 1951, the government, through the General Services Administration, advised the Dock Board by telegram that it wished to revise the rental schedules[2] and verbally

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[1] The leases to petitioners were as follows:

Laclede Steel Company	March 9, 1950, amended July 15, 1950
Krim-Ko Corporation	August 2, 1949
Schaller Steel Works, Inc.	October 26, 1949, amended August 16, 1950
B & H, Inc.	January 11, 1951
Stewart-Duravau Company	April 1, 1949 July 15, 1949
Cloar Glass Company, Inc.	August 31, 1949, amended August 22, 1950
Claude A. Staats & Son, Inc.	January 15, 1951

(This lease was negotiated in early December 1950; Staats took possession about December 10, 1950; the term of the lease began January 5 1951). (R. 562-63).

[2] The deed of conveyance from the government to the Dock Board contained a provision for a schedule of minimum rentals and such a schedule was published on May 11, 1948. The minimum rentals were recognized as being substandard and were so fixed to offer attractive inducements to prospective tenants. All witnesses testifying for the Dock Board

Continued

advised the Dock Board that the request was made in order to prevent the Dock Board from leasing additional space and because the government had a prospect which would take the remaining unoccupied space (R. 777, 778, and 780).

On January 18, 1951, the Dock Board was informed by communication from the Corps of Engineers, U. S. Army, Galveston District, that it desired to secure the use of the complete property and requested an immediate right of entry to the unoccupied portion of the property. The Dock Board forthwith granted the request and right of entry and began negotiations with government representatives for the requested lease. On January 19, 1951, the Dock Board informed the Lessees of the demand of the Corps of Engineers for exclusive use of the property and requested that the Lessees cooperate with the government. By April 20, 1951, negotiations for the lease requested by the government had reached the point where the proposed lease, excepting the rental figure, was agreed upon. However, on that date, the government, without prior notification, instituted these proceedings in federal district court. The jurisdiction of the federal district court was based upon the provision of Section 1358 of Title 28, United States Code (28 U.S.C.A. 1358). An order of court granted to the government the complete and exclusive use and occupancy of the property for a term of years until June 30, 1975. Delivery to the government of possession of certain portions then under lease and occupied by Lessees of the Dock Board was deferred by the court's order of April 20, 1951 and subsequent orders

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= Continued

or petitioners called the fixed rental rates "ridiculously low and unrealistic and not indicative of the market value at that date." (R. 367). The commissioners specifically found that these rentals were not indicative of and did not represent the fair market rental value of the property. (R. 501).

until May 1, 1951. On May 1, 1951 the Dock Board delivered the property to the government. (R. 297 and 298).

On February 11, 1952, the court, upon the government's amended complaint filed pursuant to the Declaration of Taking Act (40 Stat. 1421, 40 U.S.C. 258a), entered its order, vesting in the government all the right, title and interest of the lessees in and to the space leased to them in the Michoud Industrial Facilities.

Within a short time of the filing of the government's complaints, 37 lessees had become parties to the suit in addition to the Dock Board. The sole issue involved insofar as the Lessees were concerned was the value of their unexpired leaseholds as of May 1, 1951, the date agreed upon for valuation of the Lessees' interest.

On February 13, 1953, the government moved for a jury trial, but its motion was denied by the district court for the reasons set forth in its findings of fact and order. (R. 184).

The Court appointed a commission under the authority of Rule 71 A(h), Federal Rules of Civil Procedure, with a New Orleans attorney as its chairman. Numerous pre-trial hearings were held and the court invited suggested charges to be given by the court to the commission. These charges were the subject of extensive comment, criticism, objection and hearing. No exceptions were taken to the charges as finally given by the court. (R. 653).

The commission viewed the property on October 5, 1954. On October 11, 1954 the case came on to be heard before the commission. The commission conducted hear-

ings on 70 days, during which time 51 witnesses were heard (a total of 7,262 pages of testimony), and 367 exhibits were received in evidence. (R. 270 and 271).

Extensive briefs were filed and oral arguments were heard by the commission in March of 1956. On July 21, 1958 the commission filed its report consisting of 255 pages and 8 charts. This report represents a painstaking review of all the evidence and a detailed analysis of the entire proceedings—the history of the property, the market conditions prevailing, the highest and best use of the property, the various approaches to value, and the testimony of all lay and expert witnesses. The commission determined that just compensation due the Lessees was as follows: (R. 597).

Laclede Steel Company	$225,167.84	(75¢ per sq. ft.)
Krim-Ko Corporation	$ 75,891.90	($1,00 per sq. ft.)
Schaller Steel Works, Inc.	$ 23,143.46	(60¢ per sq. ft.)
B & H, Inc.	$ 5,938.88	(45¢ per sq. ft.)
Stewart-Duravan Company	$ 33,781.83	(60¢ and 50¢ per sq. ft.)
Cloar Glass Company	$ 10,390.96	(56¢ per sq. ft.)
Claude A. Staats & Son, Inc.	$182,941.15	(60¢ per sq. ft.)

Objections to the commissioners' report were filed by the government on November 7, 1958. (R. 606). After giving the parties the better part of a year in which to brief the matter thoroughly, the district judge heard arguments on the government's objections and after due deliberation overruled them on June 20, 1960. (R. 642).

The parties were then given sufficient time to prepare a form of judgment, and on October 1, 1960, the district court entered its final judgment wherein it was ordered, adjudged and decreed that the report of the com-

mission be confirmed and that the report of the commission and the court's charges to the commission be made the findings of fact and conclusions of law of this case, respectively. (R. 651).

In December of 1960 the United States filed a notice of appeal. This matter was briefed and submitted to the United States Court of Appeals for the Fifth Circuit, and on August 22, 1963, over 12 years after the original complaint was filed, the Fifth Circuit reversed and remanded the case to the district court for further proceedings. That court's opinion contains no specific instructions to the district judge but only a general directive for him to proceed in a manner not inconsistent with that court's judgment. Although the Fifth Circuit opinion specifically recognized that some of the lessees had unusual and peculiar leaseholds entitling them to the benefit of the bargain they had obtained in their leases, it failed to enumerate which lessees it meant but instead, remanded the entire case.

The majority opinion of the Fifth Circuit holds that the minimum rentals called for by the rental schedules published in 1948 were controlling and that the commission erred in failing to consider the existence of unleased space available at the published rental rates.

Petitioners filed an application for rehearing on November 14, 1963 which was denied without opinion by the Fifth Circuit on December 13, 1963.

REASONS FOR GRANTING THE WRIT

I.

THE FIFTH CIRCUIT COURT OF APPEALS HAS MADE INDEPENDENT FACTUAL DETERMINATIONS THAT ARE WHOLLY INCONSISTENT WITH THE FINDINGS OF THE COMMISSION ADOPTED BY THE DISTRICT COURT WHICH FINDINGS ARE ABUNDANTLY SUPPORTED BY COMPETENT EVIDENCE INCLUDING THE TESTIMONY OF EXPERTS SKILLED IN THE FIELD OF INDUSTRIAL REAL ESTATE, AND SUCH A DETERMINATION BY AN APPELLATE COURT SO DEPARTS FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS IN CONDEMNATION CASES AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION

It is important to remember at the outset that this case, involving the Dock Board and 37 Lessees, began in April of 1951. It was tried before the commissioners for 70 days. Fifty-one witnesses were produced and the transcript of testimony consists of 7,262 pages. In addition, 367 exhibits were filed and the commissioners' report consists of 255 pages. This report is a model of detail, nonargumentative and objectively presented discussion of the evidence pro and con, witness by witness, issue by issue. The only thing in the commissioners' report found objectionable by the Fifth Circuit is that the evaluations placed on the property by New Orleans realtors who were experts in the field do not coincide with the opinion of the majority as to what real estate values in New Orleans **should be.** Judge Brown pointed this out in his dissent at p. 55:

"In our remote positions whether in the Courthouse

> at New Orleans or from our various home environs, we are undertaking to declare as a matter of law that in these opinions these working New Orleans real estate experts simply do not know what they are talking about. To reverse the judgment, we are saying as Judges that no reasonable man could find that waterfront property of the kind available at Michoud does not have the value placed on it by Lemarie or the others. When courts make such statements, it inevitably means that Judges are here testifying from their own or collective experience." (*infra* at A47).

The Commissioners' report, which is unassailed by the Fifth Circuit except as noted above, is complete. It is not even suggested by either the government or the Fifth Circuit that the report is not sufficiently detailed as to findings of fact to permit adequate review. Thus, this case insofar as the report of the Commission is concerned is wholly unlike *2,872.88 Acres of Land v. United States*, 32 L.W. 4165 (Feb. 24, 1964) in which this Court modified and remanded the opinion of the Fifth Circuit Court of Appeals reported at 310 F.2d 775 (1962). The two cases are also strikingly dissimilar in that the commission in *2,872.88 Acres of Land v. United States* entered awards exceeding the valuation placed on the property by the landowners' own expert witness whereas in the instant case the value of the property as found by the commission was well within the range of creditable testimony.[*]

The instant case presents not an attack by the Fifth Circuit on the thoroughness and completeness of a com-

[*] A few examples of this are as follows:

Lessee	Highest evaluation	Award by Commission
Laclede	$319,125.13 (R. 559)	$225,167.81 (R. 597)
Staats	270,611.09 (R. 565)	182,911.15 (R. 597)
Krim-Ko	91,665.78 (R. 570)	75,891.90 (R. 597)

Significantly, the evaluations placed on the property by the government's expert witnesses exceed the stipulated rentals which the government contends are conclusive as to the issue of value (R. 559, 565, 570).

mission report but rather an example of independent fact finding by an appellate court in direct violation of Rule 52(a). The emasculation of the "clearly erroneous" doctrine of Rule 52(a) by the majority opinion places in jeopardy the entire system of appellate review of findings of fact by a commission or master that have been weighed and approved by a district judge.

This is not a case where a retrial, either before a commission or a jury, would produce any additional evidence. As a matter of fact, a retrial at this date would make it impossible to recreate the situations that existed in 1951 because since the date of the trial some of the original witnesses have died and some of the attorneys involved are deceased.

The comprehensive instructions given by the trial judge to the commissioners are not assailed by the Court of Appeals nor has any objection thereto been made by the government, as this Court suggests in *2,872.88 Acres of Land v. United States*, *supra*, the government has a responsibility to do. In fact, there would be no legal basis for the government to attack these instructions as the 40 instructions illustrate almost literal compliance with the instructions suggested by this Court in *2,872.88 Acres of Land v. United States*, (R. 272-291). Everything suggested by the court, with the exception of two minor points,[1] in the *2,872.88 Acres of Land v. United States* case is covered by the explicit, detailed instructions herein. Judge Brown recognized this several times in his dissenting opinion, wherein he stated:

"The Court appointed a Commission with a New

[1] There is no explicit instruction on the qualifications of expert witnesses, but this is immaterial since the government does not attack the competency of the experts' testifying for the Dock Board and the Lessees. There is also no instruction as to severance damages because no question of severance damages was involved in any way in this case.

Orleans attorney as its chairman. Numerous pretrial hearings were held. The Court invited suggested charges to be given by the Court to the Commission. These were the subject of extensive comment, criticism, objection and hearing. As its alpha and omega, as its **scriptural guide, these are reprinted in the opening pages of the Commission's Report. The trial Judge's order confirming the Report states expressly that "no exceptions were taken to the charges as finally given by the Court."** (*infra* at A29).

"Judge Christenberry had given precise written instructions with a clarity that could not have been improved on in an oral charge to a weary jury at the end of a 6-months trial." (*infra* at A34).

"It bears repeating that the Government acquiesced in this charge. The record shows no objection to it in the trial Court, and the specifications of error here do not attack it." (*infra* at A35).

In the absence of proper objections by the government and an assignment of error these instructions became the law of the case. *Carter Carburetor Corp. v. Riley*, 186 F. 2d 148 (8th Cir. 1951); *Rittgers v. United States*, 154 F. 2d 768 (8th Cir. 1946); *Actna Life Insurance Co. v. McAdoo*, 115 F. 2d 369 (8th Cir. 1940). Consequently the Court of Appeals had before it a judgment of the lower court which contained no error of law and a comprehensive report of commissioners which complied in every respect with the district court's instructions. In reversing the district court and remanding the entire proceeding, the Court of Appeals found it necessary to make independent factual determinations and in effect substituted its own judgment for that of the commission

which was based on the testimony of the expert witnesses and all the other evidence. This was forcefully stated by Judge Brown in his dissent (*infra* at A47):

> "I have dwelt on this at length because to me it demonstrates that no matter how much we sugar coat it, in this reversal this court is engaging in the process of fact finding."

It is submitted that the Court of Appeals has completely ignored the "clearly erroneous" rule prescribed by Rule 52(a) and Rule 53(e)(2) of the Federal Rules of Civil Procedure which provide in part:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court." (Rule 52a)

> "In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous." (Rule 52(e)(2).)

The instant case represents a rather recent change by the Fifth Circuit, for as recently as 1961, that Court recognized the effect of the above stated rules on its scope of review by stating in *United States v. Tampa Bay Garden Apartments, Inc.*, 294 F. 2d 598, 607 (5th Cir. 1961):

> "It is not, as we have pointed out, our function to re-try the case de novo, to reconcile the conflicts of evidence, to adopt or reject capitalization theory. These are questions for the District Court * * * it is not within our province to reweigh it. Unless the judgment is clearly erroneous we should affirm it * * * "

See also: *Stephens v. United States*, 235 F. 2d 467 (5th Cir. 1956); *Seale v. United States*, 243 F. 2d 145 (5th Cir. 1957).

The majority opinion of the Fifth Circuit, without pointing to any error in the instructions given by the district court, has simply elected to substitute its own judgment as to valuations and has disregarded the opinions of the experts. If the Fifth Amendment is to have the vitality which this Court insists upon, a determination of fair market value, when there are no comparables, inescapably rests upon the expert opinion of those skilled in the field after the trier of fact makes such modification and adaptation as the total record reasonably requires. This Court has many times pointed out the illusive nature of this problem especially when large or unusual properties are involved. *Boom Company v. Patterson*, 98 U.S. 402 (1878); *Olson v. United States*, 292 U.S. 246 (1934).

The majority opinion of the Court of Appeals implies that the experts and the commissioners were unaware that substantial areas of the Michoud property remained unoccupied despite the active solicitation of tenants at uniform rates of 20-30¢ per square foot and that the commissioners disregarded the fact that a hypothetical purchaser of the property would have considered this fact in making an offer for the property. However, as Judge Brown has pointed out in his dissent, *infra* at A32-38, the commission was thoroughly familiar with these facts as this was the main thrust of the argument urged by the government. The commission did not "ignore" it. It was weighed and found wanting.

Petitioners submit that the individual claims of the Lessees have been unduly prejudiced by the court's pre-

occupation with the fiction of a hypothetical seller and a hypothetical purchaser of the interest of the Dock Board. The Fifth Circuit seems to overlook the fact that the interest of an individual tenant cannot be measured by the same standards which a trier of fact would apply to the Dock Board's interest. Conceding for sake of argument that the large amount of vacant space at Michoud on May 1, 1951 would perhaps greatly influence the fair market price that a hypothetical purchaser of the fee would pay to a hypothetical seller, it does not follow that the presence of unleased vacant space in the interior of the principal manufacturing building would have the same effect upon a hypothetical purchaser of a tenant's leased space on the outside perimeter of that building or space in a separate building. The Court impliedly recognized this because it acknowledged that many of the tenants had unusually valuable space which could not be duplicated at the Michoud facilities, and further that a hypothetical buyer of the fee interest would view the land and buildings "with the disadvantages of much of the choice locations having already been leased to others." *Infra* at A17. Obviously, a tenant with a choice location would not be affected by the presence of unleased space at Michoud if the fictional hypothetical buyer of his leasehold interest could not obtain similar space at Michoud. Considering the fact that all of the petitioners herein have either separate buildings, perimiter space in the main manufacturing building, or other particularized space with peculiar and especially valuable characteristics it is difficult to understand how the Fifth Circuit attached such significance to the presence of unleased inferior space in determining the valuation of a particular Lessee's interest. In the words of Judge Brown " * * * the Lessees for all practical purposes are the real victims of a fiction." *Infra* at A52.

The Fifth Circuit in the majority opinion acknowl-

edges that the Lessees have a much more appealing argument against the application of the principal which it applied to the valuation of the interests of the Dock Board. (*infra* at A19). That court also accepts the fact that the Lessees were required to find space on the market in the vicinity of the City of New Orleans at rental some three times as much as they had been paying under their leases with the Dock Board. Yet, the Fifth Circuit, seemingly with regret, holds that under the doctrine set forth by this Court in *United States v. Cors*, 337 U.S. 325 (1949), the Lessees cannot be compensated on the basis of the market as it existed on May 1, 1951 because the rental values in the New Orleans area were inflated as a result of the government's taking of the Michoud facilities. The Fifth Circuit's holding in this respect is incorrect for at least two reasons.

First, there is no foundation for the assumption that the rental values in the New Orleans area were inflated as of May 1, 1951 because of the government's condemnation of Michoud. The effective date of taking insofar as the Lessees' interest is concerned was May 1, 1951. The fair market value of their interest must be measured as of that date. The record is replete with the testimony of qualified real estate experts to the effect that the market demand for industrial property comparable to the leases held by petitioners at Michoud increased steadily from the latter part of 1950 through 1952. This demand was attributed to both national and local conditions, including the tendency of industry to move south, the increased industrial growth in New Orleans, the expansion towards East New Orleans, and the acute lack of property suitable for industrial use in the vicinity of New Orleans. It was not attributed to the government's need or the threat of condemnation.

As evidence of the acute shortage of industrial property and the fact that rental values on such property were steadily increasing prior to any knowledge of the condemnation at Michoud, petitioners invite the Court's attention to the testimony of the following witnesses:

1. Col. Marcel Garsaud, a witness for and on behalf of the Dock Board, testified that the demand for industrial property began in late 1950 and picked up like a snowball in 1951 and 1952 (R. 829, 838, and 853).

2. Mr. F. Poche Waguespack, called as a witness by and on behalf of the Dock Board and tenants, testified that New Orleans experienced the largest demand for industrial property in January of 1951 that he had ever experienced. He specifically discounted the effect of this condemnation suit. (R. 907, 930, 940, 959, 1005, 1573, and 1820).

3. Mr. Joseph E. Blum, an expert witness called by and on behalf of the Dock Board, testified that the demand for industrial property became more and more acute from the middle of 1950 up to the end of 1952 and that in his general experience the increase in values from January 1, 1951 to December 23, 1952 were "stupendous." (R. 1034, 1067, 1068, and 1069).

4. Mr. S. M. Lemarie, a witness called by and on behalf of the Dock Board and Lessees, testified that there was a very definite demand for industrial property all during the years 1951 and early part of 1952 (R. 1096, 1119, 1120, 1205, 1577, 1580, and 1582).

5. Mr. Eugene A. Asckaffenburg, a witness called by and on behalf of the government, acknowledged on cross-examination that the year 1952 was a record one for industrial expansion in Louisiana and that the statistics on new or expanded industry in 1952 showed expansion

three times over that in 1951 and six times over the expansion in 1950. (R. 1395).

The only witness offered by the government who denied the general industrial expansion in the New Orleans area and the corresponding rise in the market for rental properties was Mr. J. Burrows Johnson. However, it is significant to note that this witness admitted that he was not in the industrial property business about the time of the condemnation. (R. 1448). There is little wonder that the commissioners weighed his testimony and found it wanting when it is compared to the testimony of the five witnesses listed above, all of whom recognized that market values were increasing in the New Orleans area and none of whom attributed this to the government's need which provoked the taking of Michoud. Clearly, the commissioners' finding that any increment in real estate values did not result from a scarcity caused by the government (R. 369) is supported by the weight of credible testimony and reversal of this finding of fact can only be explained by the Fifth Circuit's complete disregard of the "clearly erroneous" rule.

Other testimony in the record clearly illustrates that the general market value of commercial property in New Orleans had begun to rise before there was any indication that the government intended to take Michoud. Some of the best examples, as testified to by Lemarie, who recognized that the leases to which he referred were not comparables but were actually inferior property, were the lease to Mack Truck Company on October 1, 1949 at 63c per square foot, the lease to General Truck Company on September 20, 1950 at 80c and the lease to Sharpe & Dohme on October 1, 1950 at 69c. (R. 1140-1148). Obviously, all of these leases were negotiated and signed long before there was any threatened condemnation of

Michoud by the government. Additional evidence that the difference between the value of the tenants' leases and the 20¢ schedule of rentals was not due to the needs of the government is the fact that petitioner, Krim-Ko Corporation, leased alternative facilities in New Orleans at the rate of 90¢ per square foot, which lease was negotiated in February and March of 1951 and signed on March 21, 1951, at a time when it was not known that the government would condemn Michoud. (R. 496-497).

Certainly the preponderance of the evidence presented on the question of market demand in May of 1951 indicates that there was an acute shortage of industrial property during the latter part of 1950 and all during 1951 and 1952. Petitioners submit that it was within the province of the commission and the district court to conclude that the condemnation at Michoud did not bring about the increased demand for industrial property in New Orleans as of May 1, 1951. (R. 473) Any conclusion to the contrary by the Fifth Circuit is nothing more than speculative inference on the part of the majority of that Court and represents a radical departure from the accepted and usual course of judicial proceedings in condemnation proceedings. Judge Brown in his well reasoned dissent was critical of the majority of the Court for assuming the role of a fact finding body and attempting to re-try the case de novo. Judge Brown stated:

> "Of course the difficulty in working with the court's opinion is that it is difficult to ascertain when we are declaring law and when we have taken on the role of persons skilled in the sale, lease, rental, disposition and management of large industrial properties in a major port. (*infra* at A36).
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> "It has been tried on legal principles to which there was no timely objection registered or pre-

served. It was certainly the kind of case making a jury trial unsuited. F.R. Civ. P., 71A(h). Fact findings have been made by the body constituted under the rules to determine such a case. There, in the main, it should end. For that is the meaning of clearly erroneous, even in condemnation cases." (*infra* at A53-54).

The second important reason why the Fifth Circuit erred in relying on the *Cors* case is that it is inapposite in its facts. The *Cors* case involved a condemnation of a vessel under Section 902 of the Merchant Marine Act of 1936. This statute provided " * * * but in no case shall the value of the property taken or used be deemed enhanced by the causes necessitating the taking or use." It is implicit in the opinion of the Court in that case that it was not concerned with "just compensation" as provided for by the Fifth Amendment to the United States Constitution and as interpreted by the jurisprudence, but rather the Court was concerned with the interpretation of the particular statute in question. The Court of Claims found that the value of the tug in question had increased for two reasons: (1) there was a general increase in market values of nearly all vessels in and around the Port of New York between September 8, 1939 and May 27, 1941 due to the demand for vessels which followed the outbreak of war in Europe; and (2) that there was an increase after May 27, 1941 and particularly after December 7, 1941 which was due to the government's need for vessels and its requisitioning program. The Supreme Court considered that these findings were not sufficiently discriminating to enable them to tell how much of the enhancement in value was attributable to the government's need.

The *Cors* case can be distinguished from the instant case in that there was a definite finding of fact by the

lower court in the *Cors* case that some of the enhancement of the tug's value was attributable to the government's requisitioning program. In the instant case, the commissioners and the district court made no such finding and there is no evidence to support the Fifth Circuit's erroneous conclusion that rental values in New Orleans had increased prior to May 1, 1951 as a result of the government's need or condemnation of Michoud.

II.

THE FIFTH CIRCUIT ERRED IN REMANDING THIS ENTIRE CASE WITHOUT SPECIFIC INSTRUCTIONS TO AFFIRM THE AWARDS AS TO CERTAIN TENANTS

Petitioners submit that the Fifth Circuit in remanding this case to the district judge with an opinion that does not contain a clear mandate as to what action the district court should take, has cast an intolerable burden on the trial judge as well as all parties to this litigation. This is particularly true because the Fifth Circuit has recognized in its opinion that some of the tenants

> "* * * had acquired particularized space with peculiar and especially valuable characteristics that could not be duplicated in any of the remaining vacant space in the buildings. To the extent that the lessees have proved the existence of such facts and to the extent that they have proved that they had something of a bargain in making their own leases that kept their leases from representing the fair market value of the space at the time the leases were entered into, they are entitled to the benefits of their bargain." (*infra* at A22).

Petitioners respectfully submit that they have proved the existence of the facts referred to above and that the record is complete as to them. The Fifth Circuit should

have named the tenants to which it referred and should have issued a mandate ordering the trial judge to affirm the award in favor of them. The authority of the Fifth Circuit to order an affirmance as to some parties and to make a different disposition of the case as to other parties is clearly recognized. 28 U.S.C., Section 2606. "The criterion is, how may the ends of justice best be served." *Construction Publishing Company v. Dale*, 164 F. 2d 210 (5th Cir. 1947). This principle was followed by the Fifth Circuit in the recent case of *Simpson v. United States*, 322 F. 2d 688 (5th Cir. 1963) wherein the Court stated:

> "Where there are firm guide lines establishing the basic elements of the award and it can be computed with some degree of certainty as easily by the appellate court as by the trial judge, it would be more wasted motion to remand the case for new findings."

Petitioners submit that it was error for the Fifth Circuit to remand the entire condemnation proceeding to the district court in view of the fact that the Court has specifically recognized that some of the parties are entitled to the awards as found by the commissioners. The record is complete with respect to the leasehold interest of petitioners and the evidence warrants the conclusion that petitioners are entitled to the market value of their leasehold interest as of May 1, 1951 as found by the district court.

CONCLUSION

It is respectfully submitted that the Fifth Circuit Court of Appeals, in making independent factual determinations of value, has ignored the "clearly erroneous" rule and has so far departed from the accepted and usual course of judicial proceedings in condemnation matters

as to call for an exercise of this Court's power of supervision. For the foregoing reasons petitioners submit that a writ of certiorari should be granted.

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CERTIFICATE OF SERVICE

I certify that I have this day served copies of the foregoing Petition for Certiorari on the United States of America by depositing the same in the United States Mail with Air Mail postage prepaid, addressed to the following:

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New Orleans, Louisiana, this day of March, 1964.